United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

They intended to remove the disparity of difference in

ORIGINAL 75-4249

United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matter of the Claim for Compensation under the Longshoremen's and Harbor Workers' Compensation Act made by

CARMELO BLUNDO,

Claimant-Respondent,

—against—

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,

Self-Insured Employer-Petitioner,

—and—

DIRECTOR OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

B

P/S

On Review of Decision of the Benefits Review Board of the United States Department of Labor

BRIEF FOR PETITIONER

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The employer does not deny that at other points near

The Benefits Review Board stated the facts in substance

TABLE OF CONTENTS

PAGE

Cases Cited

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BRIEF FOR PETITIONER

Statement

Petitioner appeals from a decision of the Benefits Review Board of the United States Department of Labor

(20a-25a), wherein the Benefits Review Board affirmed a previous decision of an administrative law judge of the United States Department of Labor (8a-17a), which held that an accidental injury sustained by the claimant-respondent on January 8, 1974, while in the employ of the petitioner herein, comes within the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act (33 USC §901 et seq.).

The Issue

The sole issue presented on this appeal is whether the claimant's accidental injury sustained on January 8, 1974 while in the employ of the self-insured employer herein comes under the jurisdiction of the Longshoremen's and Harbor Workers Compensation Act or whether it comes under the jurisdiction of the Workmen's Compensation Law of the State of New York.

All questions other than jurisdiction have been resolved by stipulation (5a).

The Facts

Claimant sustained an accidental injury arising out of and in the course of his employment by the self-insured employer-petitioner, International Terminal Operating Company (hereinafter referred to as ITO), on January 18, 1974. The activities of his employment at the time of his injury were located at a pier at 19th Street in Brooklyn, where he was engaged in checking cargo being removed from a container at that location (44a, 45a). While checking a draft containing cargo claimant walked around the draft to mark it with a crayon, when he slipped on ice on the ground and fell down on the ground (52a). The container belonged to American Export Lines and had

been removed either by American Export Lines or some other agency under American Export Lines control at a location distant from claimant's place of work at 19th Street in Brooklyn (48a, 55a, 56a, 62a, 67a, 94a).

The container had been brought to the 19th Street location by Murphy Trucking Company, a common carrier trucking company, on a truck driven by Teamsters Union Members, having no relationship to ITO, over public streets from the American Export Lines, facility (55a, 56a). The container had not been unloaded from a ship at the 19th Street ITO location where claimant was working at the time of his injury (55a).

At its 19th Street location ITO was not engaged in the loading or unloading of ships, it was engaged only in warehousing operations and the stripping and stuffing of containers (79a, 80a, 81a).

ITO was merely consolidating cargo into a container for later movement to American Export Lines facility or, going in the other direction, taking cargo out of a container that had previously been removed by American Export Lines from its ships and transported by common truck carrier to ITO's location in Brooklyn where claimant was employed, and was injured (40a, 79a, 81a).

At the 19th Street location ITO maintained warehousing operations for further trans-shipment of cargo (81a). Cargo could remain there for periods of time that vary from days to weeks (82a, 64a).

POINT I

To be compensable under the Longshoremen's and Harbor Workers' Compensation Act the activities of a longshoreman at the time of injury must be maritime in nature and having direct connection with the loading or unloading of a ship.

As indicated, supra, there is no question about the compensability of claimant's injury as having occurred out of and in the course of his employment by ITO. If the accidental injury herein is not within the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as LHWCA) it would come under the provisions of the Workmen's Compensation Law of the State of New York.

Congress amended the LHWCA effective November 26, 1972 in numerous aspects including changes in the jurisdiction of the Act. The question presented on this appeal is whether claimant's injury herein comes under the jurisdiction of the LHWCA as newly defined in the amendments.

Prior to the November 26, 1972 amendments situs was the determining factor for jurisdiction. An accidental injury had to occur upon the navigable waters of the United States to come under the Act. If it occurred at a pier or on land, even though claimant was actually engaged in loading or unloading a ship, it would not come under the Act (*Southern Pacific Co.* v. *Jensen,* 244 U.S. 205; *Nacirema Operating Company* v. *Johnson,* 396 U.S. 212).

Discussion arose as to the possible inequity of granting benefits under the LHWCA to a longshoreman for injuries occurring while standing on a ship during the loading or unloading thereof, while excluding injuries sustained by a longshoreman standing only a few feet away

on a pier, and who was also engaged in the loading or unloading of the ship. The claim of the latter would be governed by a state Workmen's Compensation Law and not the LHWCA. Congress therefore decided that the LHWCA should be changed to cover both types of situations.

The intent of congress in extending shoreward the jurisdiction of the LHWCA, by amendments effective November 26, 1972, is observable from committee reports as follows:

> "Thus, coverage of the present Act stops at the waters edge; injuries occurring on land are covered by state workmen's compensation laws. The result is the disparity of benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which state the accident occurs." (3, U.S. Code, Congressional and Administrative News, 92nd Congress, Second Section, Extension of coverage to shore side areas, page 4704).

To accomplish the desired result of extending the coverage of the Longshoremen's and Harbor Workers' Compensation Act landward the 1972 amendments restated the definition of "employee" as follows:

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, ship builder, and ship breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net" (33 U.S.C.A. §902 (3)).

They redefined the circumstances when compensation is payable in respect of disability or death of an employee as follows:

> "Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the nagivable waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel). * * *" (33 U.S.C.A. §903 (a)).

The Longshoremen's and Harbor Workers' Compensation Act was established by Congress under its constitutionally granted power to legislate in maritime and admiralty matters (*Crowell* v. *Benson,* 285 U.S. 22).

The new wording of §902 (3) and §903 (a), supra, extending jurisdiction, specifically requires that the activities of the employee be maritime in nature and that the injury occurs upon the navigable waters of the United States or in areas so intimately and closely associated therewith as to be considered as occurring upon the navigable waters of the United States.

Congress had no intention of covering all employees of a firm some of whose employees were engaged in maritime activities and others who were not.

The amendments of 1972 redefined an "employer" within the meaning of the Act as follows:

> "The term 'employer' means an employer any of whose employees are engaged in maritime employment, in whole or in part, upon the navigable waters of the United States, (including any adjoining pier, wharf, drydock, terminal, buildingway,

> marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." (33 U.S.C.A. §902 (4).

Comparison of the definition of "employer" under §902 (4), with the definition of "employee" under §902 (3) shows a very clear differentiation. Under the definition of "employer" the Act includes an employer *any* of whose employees are engaged in maritime employment. Thus an employer who has some employees who are engaged in maritime employment and some who are not, is nevertheless, an employer within the definition of the Act.

On the other hand the definition of "employee" requires that to be covered under the Act the employee himself must be engaged in maritime employment.

Further definition and limitation of coverage is set forth in §903 (a), supra which requires that death or disability from an accident must result from an injury that occurs upon the navigable waters of the United States including adjacent areas, customarily used by the employer in loading unloading, repairing or building a vessel.

The significance of the requirement that injury occur "upon the navigable waters" was commented on by the Supreme Court of the United States in *Nacirema Operating Company* v. *Johnson,* 296 U.S. 212. In *Nacirema* the Supreme Court pointed out that when the LHWCA was passed the United States Department of Labor objected to the bill in part and urged that the Act be extended to the contract of employment and not the activities in which the injury was sustained. The Court stated that congress' use of the words "upon the navigable waters", was specific limitation of coverage to injuries sustained upon the navigable waters and the Court would not extend the jurisdiction to the dock or the pier or to "longshoremen" as such.

In this respect the Court said:

> * * * "Congress might have extended coverage to all longshoremen by exercising its power over maritime contracts. But the language of the Act is to the contrary and the background of the statute leaves little doubt that Congress' concern in providing compensation was a narrower one". (*Nacirema Operating Co.* v. *Johnson* (supra) 396 U.S. 212, 215, 216).

In its amendments effective November 26, 1972 Congress still had no intention of covering all employees of an "employer" within the definition of the Act. As pointed out in *Nacirema* an evaluation of the amendments shows clearly that Congress' intention in amending the Act was a carefully limited and defined extension.

The intent of Congress in this respect found expression in their Committee reports as follows:

> * * * "The committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activities. Thus employees whose responsibility is only to pick up stored cargo for further transport would not be covered nor would purely clerical employees whose job does not require them to participate in the loading of cargo". (Senate Report No. 92-1125; House Report No. 92-1443).

Upon considering the entire background of these amendments the conclusion is inescapable that by the November 1972 amndments Congress intended to move the jurisdiction of the LHWCA landward and away from the dividing line of the waters edge established by *Southern Pacific Co.* v. *Jensen,* (supra), the so called *Jensen* line.

They intended to remove the disparity of difference in benefits that might accrue to a longshoremen engaged in the loading or unloading of a ship and sustaining injuries while physically being on the land or a pier as contrasted with sustaining injuries while located on the ship.

We submit that an examination of the statute and of the legislative background shows that there was no intention that every employee of a stevedoring company be covered under the Act. The retention and use of the words "upon the navigable waters of the United States" illustrates that longshoremen whose duties expose them to the excessive hazards encompassed in the loading or unloading of a ship should not be deprived of federal benefits merely because their injuries occurred on the land. Congress however, intended to go no further than that.

POINT II

Claimant's injuries were not sustained during the performance of a maritime activity nor did it occur upon the "navigable waters of the United States" as defined in the LHWCA.

At the time of claimant's injury he was working for the employer at a facility located at 19th Street in Brooklyn. At the particular point where the claimant was working the employer was not engaged in the loading or unloading of ships but at that point carried on only warehousing operations and the stripping and stuffing of containers (79a, 88a, 81a).

The portion of the facilities at which claimant was working was used by the employer only as a freightway station for the transfer, consolidating or stripping of a container (94a).

The employer does not deny that at other points near the facility where claimant was working the employer does load and unload ships (81a). However, claimant's activities at the time of injury had no connection with the loading or unloading of ships performed by ITO, the employer, at other portions of this same facility (60a, 61a).

The container from which cargo was being removed at the time of claimant's injury belonged to American Export Lines (55a). That container had not been taken from a ship that was berthed at ITO's facility in Brooklyn, where claimant was working (55a).

The container had been brought to the ITO facility on a truck by the Murphy Trucking Company (56a). The drivers of these trucks are members of the Teamsters Union (56a). ITO had nothing to do with the movement of the container from American Export Lines facility where the container had been unloaded from a ship (80a). The common carrier the Murphy Trucking Company moved it over public roads into Brooklyn (56a, 80a).

ITO had nothing to do with the loading or unloading from a ship of the container handled at its 19th Street location where claimant was employed at the time of his injury (61a).

ITO does not conduct any stevedoring activities for American Export Lines (94a).

After the cargo in a container has been removed therefrom consignees come by truck and ITO delivers the cargo to the truckmen (94a, 101a-104a).

Claimant's injury occurred while he was attempting to mark a draft with a crayon. The draft had been taken from the container placed on the ground, there was ice on the ground, claimant slipped on the ice and fell on the ground (52a).

The Benefits Review Board stated the facts in substance as above in its decision of October 30, 1975 (21a). It held that the injury came under the coverage of the LHWCA. In so ruling the Board stated that they have consistently held that the stripping of a container offloaded from a vessel some days earlier is part of the process of unloading a vessel and therefore maritime employment, and any employee so engaged comes under the Act (22a). They further stated that the place of the injury was in the confines of the employer's terminal adjoining navigable waters and that even though the pier at which claimant was working was not used for the unloading or loading of vessels that merely being near the navigable waters was sufficient to bring the location under the Act (23a, 24a).

They stated that the fact that this container had been unloaded from a ship by a company other than ITO, and brought to ITO's location by a trucking company in effect did not remove it from the operation of unloading a ship (21a, 22a).

It had readily been conceded in this record that ITO is an employer within the definition of the Act (106a, 107a). However, as discussed in our Point I, supra, even though the employer comes within the definition of the Act this does not mean that all its employees come under the Act.

ITO functions in many fashions. There are facilities where it does load and unload ships. There are other areas where it stores and warehouses cargo. At the 19th Street facility it stuffs and unstuffs containers. The specific facility at which claimant was engaged however, was not used for the loading and unloading of ships and claimant was not so engaged at the time of his injury.

We believe we have established under our argument in Point I that Congress specifically did not intend to cover all employees of an employer. They still maintained the requirement that the injury occur on navigable waters although navigable waters also were to include adjacent areas used in the loading or unloading of a ship. In the present instance the record shows without contradiction that the container on which claimant was working at the time of his injury had lost its maritime character as defined by the law.

Once having been removed at American Export Lines facility, either by American Export Line or some other company and placed at a point where the Murphy Trucking Company was to pick up the container, its inter ocean voyage had ceased. The Murphy Trucking Company picked up the container on its own trucks and drove them over public streets far removed from the waterfront and from the place where the ship was unloaded.

We submit that delivery by Murphy Trucking Company of the container to ITO's facilities located on the Brooklyn Waterfront was not delivery to the employer at a point customarily used by it for the loading and unloading of ships as is required by §903 (a) if it is to be an area that comes within the definition of navigable waters. The function of ITO and the handling of the container at its facility at 19th Street had nothing to do with the loading or unloading of a ship.

The Benefits Review Board has in innumerable cases attempted to hold that work in the stuffing or unstuffing of a container by a member of the International Longshoremen's Association per se constitutes maritime employment within the coverage of the Act.

This is reflected in the decision of the Benefits Review Board in the instant case and its own citations therein (22a, 23a).

The administrative law judge similarly refers to numerous cases where the Benefits Review Board attempted to clasp within the jurisdiction of the Act groups of individuals by generic classification rather than by the activities in which they were engaged at the time of their injuries (12a, 13a).

We submit that the interpretations of the Benefits Review Board, a division of the United States Department of Labor, and its administrative law judges, also a division of the United States Department of Labor, illustrate an overriding attempt to expand the jurisdiction of the amended Act far beyond what Congress intended.

The Supreme Court has laid down careful guidelines in evaluating the extent of jurisdiction intended by Congress in the passage of any Act.

The Court has several times stated the principle that powers granted Congress but not exercised by it are still reserved to the state. Therefore the Courts in evaluating jurisdiction should confine themselves to the precise limits which the statute has defined. (*Victory Carriers* v. *Laws*, 404 U.S. 202, *Healy* v. *Ratta*, 292 U.S. 263, 270). The Court specifically stated in *Victory Carrier* v. *Laws* (supra), that in the absence of explicit congressional authorization they would not extend the historic boundaries of the maritime law.

Congress in its November 1972 amendments, as illustrated in our Point I, did extend shoreward coverage of the LHWCA to injuries that occur on land but we submit clearly define that it was only to be in connection with the loading and unloading of a ship, where longshoremen are concerned. We do not refer to ship repair or ship breaking with which the instant case is not involved.

There have been numerous cases raising the issue of the Benefits Review Board interpretation of its jurisdiction under the Act.

In the hundreds of cases in which jurisdiction has been controverted and brought before the Benefits Review Board we are not aware of a single case in which the Benefits Review Board has not affirmed the finding of jurisdiction by the Administrative Law Judge and on the other hand has not reversed a ruling of the administrative law judge which originally had rejected jurisdiction.

The first decisions handed down at the level of the United States Court of Appeals are in the as yet unreported but widely circulated cases of *Adkins, Harris* and *Brown,* decided in the Fourth Circuit on December 22, 1975 (*ITO Corporation of Baltimore et al.* v. *Adkins,* Docket No. 75-1051, *Marine Terminals, Inc. et al.* v. *Brown,* Docket No. 75-1075, *Marine Terminals Inc., et al.* v. *Harris,* Docket No. 75-1196, United States Circuit Court of Appeal for the Fourth Circuit). (In the matter of *Adkins* there were also four other associated proceedings under Docket No. 75-1088, 75-1051, 75-1075, 75-1196, and a single decision covered all).

In its decision the Fourth Circuit stated:

> "We conclude that the Act's benefits extend only to those persons, including checkers, who unload cargo from a ship to the first point of rest at the terminal or load cargo from the last point of rest at the terminal to the ship. While the 1972 amendments do extend the benefits of the Act to some persons who were not previously eligible, coverage is limited by the concept of 'maritime employment', and not every person handling cargo between a ship and point of discharge to the consignee or point of receipt from the shipper is engaged in 'maritime employment'."

The Fourth Circuit thereupon in a two to one decision, one member dissenting, reversed the rulings of the Benefits Review Board which established jurisdiction. We do wish to call to the attention of this Court that by order dated March 15, 1976 the United States Court of Appeals for the Fourth Circuit granted reargument en banc on the foregoing cases with reargument scheduled for the week of May 3 to May 7, 1976.

The only other decision of a United States Court of Appeals construing the November 1972 amendments of the LHWCA regarding jurisdiction of which we are aware is *Weyerhauser Company* v. *Gilmore,* Docket No. 74-3384 decided in the Ninth Circuit on December 5, 1975 and as yet not reported.

In that case the administrative law judge had rejected jurisdiction in a claim by an employee engaged in moving logs on Coos Bay, a saltwater Bay of the Pacific Ocean. The Benefits Review Board reversed and established jurisdiction.

The Ninth Circuit reversed the establishment of jurisdiction by the Benefits Review Board. The Court, in commenting on the purpose of the 1972 amendments, specifically referred to the matter cited from the committee reports that we have included, supra, that Congress did not intend to cover employees who were not engaged in loading or unloading, repairing or building a vessel just because they were injured in an adjacent area. The Ninth Circuit then specifically stated:

> "We join in the observation of the Law Judge that the intent of Congress in extending the Act was not to 'open the doors' for all employees, but to minimize the adverse effect of a shoreside location or situs when a *maritime* employee is injured.

> The original purpose of LHWCA was to provide federal certainty of a fixed compensation for shore based *ship side workers* (longshoremen etc.) who were injured in the course of their ship's service employment 'without leaving employees at the mercy of the uncertainty, expense, and delay of fighting out in litigation whether their particular cases fell within' admiralty jurisdiction."

The Ninth Circuit further commented that the occupational hazards intended to be guarded against were those traditional to ships service employees arising from the perils of the sea.

The reason for extending special consideration to longshoremen engaged in the loading or unloading of ships has traditionally been that such occupation is hazardous beyond other occupations so as to require special consideration.

However, claimant's occupation at the time of his injury was no different from the activities of any individual engaged in the consolidation of freight having no connection whatsoever with ocean commerce or navigation.

It is common knowledge, and numerous cases decided before the Courts and in other areas of the law have noted that a container in which freight is consolidated is not a device having sole peculiar application to maritime shipments.

Containers are used in normal intrastate trucking operations. Freight consolidating companies having no relationship whatsoever to maritime commerce proliferate in each of the states.

In the present case the record illustrates that a container is not only used for consolidating freight but is also placed whole on a truck, and delivered directly to a con-

signee without being opened at all by any warehousing operator but can be and frequently is taken unopened to the consignee who handles it and its contents himself (81a, 85a).

The claimant was not injured by any factor peculiar to and a necessary hazard of the loading or unloading of ships. He was merely walking on the ground, near the warehouse, about to put a mark on a draft of cargo with a crayon when he slipped on the ice and fell to the ground. The occurrence of such an accident is in no wise peculiar to maritime operations or the frequently excessive hazards that are inherent in the loading or unloading of ships.

Certainly Congress never intended to bring within the ambit of this law injuries that occurred to employees whose activities were merely peripheral to and not peculiar to the hazards of loading and unloading a ship. Claimant's activities were concerned with that portion of ITO's operation that physically could have been performed any place where trucks can move and make deliveries.

We further submit that the interpretations of the Benefits Review Board and the arguments of the Solicitor of Labor on behalf of the Director should be viewed in proper perspective. All of these entities are within the ambit of the United States Department of Labor. The Benefits Review Board's interpretation and extension of jurisdiction of the Act by decisions rendered in numerous cases brought before it illustrates that not only should little weight be attached to their evaluations but to the contrary should be regarded with greatest caution.

As we have stated before we are not aware of a single case in which the Benefits Review Board has rejected jurisdiction and to the contrary has in every case established jurisdiction in all claims brought before it.

They have gone a great deal further. Several cases have been decided by the Benefits Review Board on the issue of jurisdiction after the Fourth Circuit handed down its decision in *Adkins, Harris* and *Brown* (supra). The cases to which we now draw this Courts attention were decided before the Fourth Circuit granted rehearing en banc. The *Adkins* decision was decided December 22, 1975, and the granting of reargument en banc was by order of the Fourth Circuit dated March 15, 1976.

In *Bradshaw* v. *McCarthy*, 75-BRB-209 decided January 26, 1976, and *Santumo* v. *Sealand Service*, 75 BRB-252 decided February 27, 1976 the Board not only ignored the Fourth Circuit's decision but expressly stated they would not follow it.

In *Brawshaw*, supra, they stated:

> "The Board is well aware of the restrictive interpretation given the status requirement by the Fourth Circuit Court of Appeals in the recent case of *ITO Corporation of Baltimore* v. *Adkins*, Nos. 75-1051, 75-1075, 75-1088, 75-1196 (Fourth Cir. Dec. 22, 1975). However, we are of the opinion that our interpretation with regard to coverage is more in keeping with the amended statute and the legislative history, and we will continue to follow the line of reasoning developed in previous decisions and reiterated in this case."

In *Santumo*, supra, where the factual situation was identical to *Adkins*, the Board stated:

> "The Board has determined that its interpretation of the status requirement is in accordance with the intent of the 1972 amendments to the Act, and we will adhere to that interpretation although the Fourth Circuit Court of Appeals has taken a more restrictive view of the amendments".

In an even more recent decision *Norat* v. *United Terminals Inc.*, BRB No. 75-148 where the factual situation was again almost identical to *Adkins,* the Board used the following language:

> "The Board has determined that its interpretation of the status requirement is in accord with the intent of the 1972 amendments to the Act and will adhere to that interpretation although the U.S. Court of Appeals for the Fourth Circuit in *ITO Corporation of Baltimore* v. *Adkins,* Nos. 75-1051, 75-1088, 75-1196 (Fourth Cir. Dec. 22, 1975), has taken a more restrictive view of these amendments. *Bradshaw* v. *J. A. McCarthy Inc.,* 3 BRBS 195, BRB No. 75-209 (Jan. 26, 1976).
>
> The Board has consistently held that stripping a container within the confines of an employer's terminal is maritime employment within the meaning of the Act and is performed in an area covered by the Act. *Suarez* v. *Sealand Service Inc.,* 3 BRBS 17, BRB No. 75-168 (Nov. 18, 1975). We therefore find that the administrative law judge's determination of this injury is compensable under the Act is in accordance with the law".

The Benefits Review Board decision in the *Norat* case, supra, makes no reference to the *Weyerhauser* v. *Gilmore* case in the Ninth Circuit (supra), nor do they refer to their position as in any way related to the reargument en banc scheduled in the Fourth Circuit.

We find it disconcerting that a duly constituted agency of our government should disregard decisions of an Appellate Court in next order above it, which Court is established as the next step in consideration of issues under the LHWCA and as established in the LHWCA itself §921 (c). The Benefits Review Board apparently pays no at-

tention whatsoever to decisions of the Supreme Court which we have cited above and which have been long established law, or to the principles which the Supreme Court has laid down in respect of interpreting congressional legislation.

Contrary to the decisions of the Benefits Review Board we submit that in the instant claim it is quite clear that at the time of his injury claimant was not engaged in an activity that was maritime in nature within the definitions of the LHWCA, nor was the facility of the employer at which he was working at the time of the injury a location that comes within the definition of navigable waters as defined in §903 (a).

POINT III

Similar issues of jurisdiction of the LHWCA are now before this Court in other cases.

Along with the present claim we are aware of four other cases now before this Court involving the interpretation of the extension of jurisdiction of the Longshoremen's and Harbor Worker's Compensation Act as amended November 1972. These cases are:

Pittston v. *Spataro,* Docket No. 75-4220;
Northeast Terminals v. *Caputo,* Docket No. 76-4009;
Pittston v. *Delaventura,* Docket No. 76-4042;
Pittston v. *Scafidi,* Docket No. 76-4043.

A consideration of the factors involved in these four cases are illustrative of the enormous problems and the wide ranging effect of application of jurisdiction of the LHWCA as interpreted by the Benefits Review Board.

We submit that an examination of the factual patterns of the five claims before this court illustrates the soundness of the so called "point of rest" standard in evaluating whether activities of an employee are to come under the Longshoremen's and Harbor Workers' Compensation Act or under a particular compensation law of the state in which the injury occurs.

It is difficult to know where the Benefits Review Board left to its own devices would draw a line, if any, on tending the jurisdiction of the Act. In the instant claim it is not inconceivable that they might attempt to hold that the employees of a trucking company, such as Murphy's Trucking, which carried the containers in the instant claim from American Export Lines facilities over state roads to Brooklyn would come under the coverage of the Act. They could conceivably decide that a manufacturer of goods, a portion of which is ultimately to be shipped overseas, is nevertheless under the coverage of the Act because at some point he is going to put his product into crates to be taken down to a terminal and shipped overseas.

There must be some line of demarcation that is both sensible and in direct relationship to the intent of congress in amending the Act.

Using "point of rest" as a basis for analysis as to where handling of cargo leaves maritime classification and comes within the state jurisdiction is, we submit, the soundest way of setting up the boundaries beyond which the jurisdiction of the LHWCA do not extend.

Under the Occupational Safety and Health Administration regulations longshore operations have been defined as:

> "loading, unloading, moving or handling of cargo, ships stores, gear, etc. into, in, or out of any vessel on the navigable waters of the United States."

It is contended herein. that there must be some con-

The point of rest theory is completely in accordance with this definition by OSHA. We submit that Congress intended to cover the movement of cargo from a ship to the point where it comes to rest at a holding area or at a point where it is to be further moved to a warehouse, there to be further handled.

In the situation of a container such as in the present case we submit that the point of rest occurred when American Export Lines unloaded the container from its ships and placed it at a point where the trucking company then was to pick up the container to move it to ITO's facilities. We submit that at that point relationship to interocean commerce and navigation ceased and that the handling of the container thereafter had no greater relationship to the hazards of maritime or admiralty jurisdiction than any other warehouse operation conducted entirely within the confines of a state.

"Point of rest" should be the test applied to determination as to how far jurisdiction of the Act extends. Point of rest in the instant claim had been reached long before the container was brought to ITO's location. Therefore on an analysis from the point of rest view this claim should be rejected as not coming under the jurisdiction of LHWCA.

POINT IV

Use of the term longshoreman or membership in the longshoreman union does not per se create jurisdiction tion under the LHWCA.

Many of the tasks and warehouse operations carried on by stevedores are performed by employees who are members of the International Longshoreman's Association.

Applying the name "longshoreman" or fact of membership in the longshore union establishes no jural status. (*Nacirema Operating Co.* v. *Johnson* (supra) 396 US 212, supra).

Congress intended that jurisdiction shall be determined, as we have illustrated n previous points, supra, by the requirement that an injury occur upon the navigable waters of the United States including adjacent areas as defined in the Act, and for longshoremen while in the actual activity of loading or unloading ships.

An attempt to create jurisdiction by attaching the label of longshoreman or member of the longshore union cannot and should not be the determining factor deciding whether there is jurisdiction under the LHWCA.

CONCLUSION

For all the foregoing therefore petitioners ask that the decision of the Benefits Review Board establishing jurisdiction of the LHWCA over this claim be reversed and the claim dismissed on the grounds that claimant's remedy is under the compensation laws of the State of New York and not under the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act.

Respectfully submitted,

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dling of cargo between ship and dock, and equipment regu-

Un The
United States Court of Appeals

In The Matter of

The Claim for Compensation under the Longshoremen's and Harbor Worker's Compensation Act made by Car,elo Blundo
Claimant-Respondent
against
International Terminal Operating Company Inc.,
Self-Insured Employed & Petitioner
and
Director Office of Worlmen's Compensation Programs
United States Department of Labor
Respondent

State of New York, County of New York, ss.:

Raymond J. Braddick, , being duly sworn deposes and says that he is agent for Linden & Gallagher the attorney for the above named Self-Insured Employer-Petitioner herein. That he is over 21 years of age, is not a party to the action and resides at
Levittown, New York

That on the 31st. day of March , 1976, he served the within

Brief and Appendix

upon the attorneys for the parties and at the adaresses as specified below

William J. Kilberg
Attorney for Workmens Compensation Programs Respondent
Solicitor of Labor
200 Constitution Avenue N.W.
Suite N 2716
Washington D.C.

by depositing 2 copies of each
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 31st.
day of March, 19 76

Raymond J. Braddick

Roland W. Johnson
ROLAND W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

Services of three (3) copies of
the within is
hereby admitted this 31 day
of March , 1976

Attorney for